



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 26, 1998

The Honorable John W. Berry
Karnes County Attorney
101 N. Panna Maria, Suite 10
Karnes City, Texas 78118

Letter Opinion No. 98-028

Re: Whether the Karnes County Correctional
Center is subject to ad valorem taxes (ID# 39325)

Dear Mr. Berry:

As you know, article VIII, section 1(b) of the Texas Constitution deems all real and tangible personal property taxable in proportion to its value unless the property is exempt from taxation as the constitution allows or requires. Article XI, section 9, exempts from taxation "[t]he property of counties, cities and towns, owned and held only for public purposes." Article VIII, section 2, authorizes the legislature by general law to exempt from taxation "public property used for public purposes." Pursuant to this authority, the legislature enacted section 11.11(a) of the Tax Code, which exempts from taxation "property owned . . . by a political subdivision of this state . . . if the property is used for public purposes." Additionally, the Public Facility Corporation Act, V.T.C.S. article 717s, exempts from taxation public facility corporations and provides for the tax treatment of facilities owned by such corporations. You ask us to determine whether the Karnes County Correctional Center is exempt from ad valorem taxes pursuant to article XI, section 9 of the constitution, section 11.11(a) of the Tax Code, or the Public Facility Corporation Act.

In Attorney General Opinion DM-383 (1996), we considered whether a jail and sheriff's office complex in Winkler County was exempt from ad valorem taxation. The facts underlying DM-383 were similar, though not identical, to the facts underlying your request. We concluded in DM-383 what courts have long recognized: whether any particular piece of property is exempt from taxation as public property used for a public purpose depends upon the facts of the particular case.¹ Similarly, in this case, the answers to your questions depend heavily upon the facts. While you have provided us with information about the center and the transactions underlying its financing and construction, we are not equipped to make the type of inquiry that a court would make in determining whether a particular piece of property is tax exempt. Therefore, we cannot determine as a matter of law whether the Karnes County Correctional Center is subject to ad valorem taxes. We can, however, as we did in DM-383, address the legal issues raised by your request. We will also address some of the issues raised by the Karnes County Appraisal District ("the appraisal

¹Attorney General Opinion DM-383 (1996) at 2; see *Texas Turnpike Co. v. Dallas County*, 271 S.W.2d 400, 402 (Tex. 1954) ("Public ownership, for tax-exemption purposes, must grow out of the facts . . ."); Attorney General Opinion DM-436 (1997) (stating that determination of tax-exempt status requires determinations of facts).

district”)² in briefs and letters submitted to this office. The appraisal district opposes tax exemption for the center.

We understand from the information submitted to us that Karnes County, Texas, created the Karnes County Public Facility Corporation (the “PFC”) pursuant to V.T.C.S. article 717s for the purpose of financing the construction of a correctional facility now known as the Karnes County Correctional Center (the “center”). The land on which the center was built was owned by the Karnes City Chamber of Commerce. The chamber of commerce deeded the land to a private corporation, Corplan, Inc., which contracted with a builder to construct the center.

Corplan and Karnes County entered into a “Lease Agreement (With Option to Purchase)” (the “lease/purchase agreement”) whereby the county agreed to lease the land and the center from Corplan, with an option to purchase the land and center on or after March 1, 2005. Article V of the lease/purchase agreement provides that it terminates upon the occurrence of the first of four events: (1) the county does not appropriate money from the center’s revenues to pay the rent; (2) the county exercises its option to purchase the center; (3) the county defaults on the lease and Corplan elects to terminate; or (4) the county pays all rents due under the lease. Corplan deeded the land and the center to the PFC and assigned its rights in the lease/purchase agreement to the PFC. The assignment gives the PFC the right to collect the lease payments from the county. In return, the PFC agreed to issue bonds, which bonds were approved by the Attorney General on March 10, 1995.³ Proceeds from sale of the bonds were to be deposited with Colorado National Bank, acting as a trustee (“Trustee”), and used to finance construction of the center.

Karnes County contracted with a private company, BRG Operations of South Texas, Inc., to operate and manage the center. Karnes County also entered into an agreement with the State of Colorado to house prisoners from that state in the center.⁴ You tell us that revenues received pursuant to the agreement with Colorado are deposited with the Trustee and are used to repay the bonds issued by the PFC and for operating expenses. Part of the revenues (25 cents per prisoner per day) goes directly to Karnes County.

²The appraisal district appraises property on behalf of the taxing authorities in whose districts the center is located, namely: Karnes County, the Karnes Hospital District, the City of Karnes City, and the Karnes Independent School District.

³The Attorney General is required under V.T.C.S. article 717k-8 to approve bonds of public facility corporations prior to issuance of the bonds. V.T.C.S. arts. 717k-8, § 3.002; 717s, § 4.047. The Attorney General certifies only that the bonds are authorized to be issued in accordance with the law, and makes no determination with respect to the tax exempt status of the facility.

⁴The agreement is dated November 22, 1995, more than eight months after the Attorney General approved the bond issuance. Thus the agreement was not reviewed or approved by the Attorney General as part of the bond approval process.

We begin by examining the constitutional and Tax Code provisions that you believe exempt the center from ad valorem taxation. Article XI, section 9 of the constitution exempts from taxation “[t]he property of counties, cities and towns held only for public purposes.”⁵ Section 11.11(a) of the Tax Code exempts property owned . . . by a political subdivision of the state . . . if the property is used for public purposes.”⁶ Tax exemption under both of these provisions requires that the center be publicly owned and used for public purposes.

The first issue a court would consider is whether the center is publicly owned. You tell us that legal title to the center and the land beneath it is held by a public facility corporation, or “PFC,” created pursuant to the Public Facility Corporation Act, V.T.C.S. article 717s (“the act”). A PFC is a nonprofit corporation created by a sponsoring governmental entity—a city, county, school district, housing authority, or special district—to act on the sponsor’s behalf.⁷ The PFC’s board of directors is appointed by the sponsor’s governing body.⁸ The sponsor may, among other things, use the PFC to construct a public facility and to issue bonds on the sponsor’s behalf to finance the cost of the facility.⁹ The act declares a PFC to be a “public corporation, constituted authority, and instrumentality authorized to issue bonds on behalf of its sponsor” for purposes of section 103 of the Internal Revenue Code, which excludes from gross income the interest on state and local bonds.¹⁰ PFCs and their boards of directors are subject to the Texas open meetings and open records laws.¹¹

Despite the declared public character of a PFC, a PFC is neither a political subdivision of the state nor other governmental entity for purposes of the constitutional and Tax Code exemptions.

⁵While article XI, section 9 speaks of a tax exemption for the property of “counties, cities and towns,” the Texas Supreme Court has held that this exemption extends to property owned by any governmental entity. See *Lower Colorado River Auth. v. Chem. Bank & Trust Co.*, 190 S.W.2d 48 (Tex. 1945). This holding has been questioned, but it remains the law. See *id.* at 52-56 (Alexander, C.J., dissenting); *Satterlee v. Gulf Coast Waste Disposal Auth.*, 576 S.W.2d 773, 779 (Tex. 1978) (on rehearing); *Leander Indep. Sch. Dist. v. Cedar Park Water Supply Corp.*, 479 S.W.2d 908, 911-13 (Tex. 1972); but see *State v. Houston Lighting & Power Co.*, 609 S.W.2d 263, 266 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.) (“Article XI, Section 9, applies only to property owned by counties, cities and towns . . .”); Attorney General Opinion DM-188 (1992) at 2 (same).

⁶Section 11.11(g) of the Tax Code provides that an improvement is owned by the state and is used for public purposes if it is (1) located on land owned by the Texas Department of Corrections, (2) leased and used by the department, and (3) subject to a lease-purchase agreement providing that legal title to the improvement passes to the department at the end of the lease period. As we stated in DM-383, in our opinion this section does not necessarily preclude a tax exemption for a correctional facility otherwise owned by a political subdivision and used for public purposes.

⁷V.T.C.S. art. 717s, §§ 1.003(14), 2.011, 3.021, 4.048.

⁸*Id.* § 3.028(a).

⁹*Id.* § 2.011.

¹⁰*Id.* § 1.002(b); see 26 U.S.C. § 103; 26 C.F.R. § 1.103-1.

¹¹V.T.C.S. art. 717s, § 3.028.

Courts have defined a "political subdivision," when the term is not defined by the particular statute at issue, as "an arm of the state created to administer the enumerated governmental powers delegated to it."¹² It is a division of the state that "has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated."¹³ Courts are inclined to find a political subdivision or governmental entity where the entity at issue was created by the legislature or the constitution and has the powers of taxation, eminent domain, or other power traditionally reserved to the sovereign.¹⁴ For example, water conservation and reclamation districts created by the legislature pursuant to article XVI, section 59 of the constitution, with power to levy taxes, have long been held to be political subdivisions of the state for taxation purposes.¹⁵

The Public Facility Corporation Act does not clothe a PFC with governmental powers. In fact, the act provides that a sponsoring governmental entity "may not delegate to a corporation the power of taxation or eminent domain, police power, or an equivalent sovereign power of the state or the sponsor."¹⁶ Although the act declares a PFC to be a public corporation, it does so only for the purposes of the federal tax code provision excluding from taxable income the interest on governments bonds. As exemptions from taxation are to be strictly construed, we decline to extend the statute beyond its express terms.¹⁷ Property is not public property merely because a PFC holds legal title to the property.

¹²*Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1*, 538 S.W.2d 659, 662-63 (Tex. Civ. App.--Amarillo 1976, writ ref'd n.r.e.) (holding that water conservation district is political subdivision).

¹³*Bexar-Medina-Atascosa Counties Water Improvement Dist. No. 1 v. State*, 21 S.W.2d 747, 749 (Tex. Civ. App.--San Antonio 1929, writ ref'd).

¹⁴See *id.* at 748-49; see also *Texas Learning Technology Group v. Commissioner of Internal Revenue*, 958 F.2d 122, 124-26 (5th Cir. 1992) (discussing federal taxation case law that requires an entity to be authorized to exercise some sovereign powers in order to be considered a political subdivision); *Lowther v. Fernandez*, 668 S.W.2d 886, 889 (Tex. App.--San Antonio 1989, no writ) (Tijerina, J., dissenting) ("[I]t would appear that a political subdivision is created only under the Constitution or by statutory law."); *Central Appraisal Dist. v. Pecan Valley Facilities*, 704 S.W.2d 86, 89 (Tex. App.--Eastland 1985, writ ref'd n.r.e.) (holding that private, non-profit corporation created at request of quasi-governmental agency and "not connected, in any way, with a county, city, town, state, or any other political subdivision or sovereignty" was not political subdivision for purposes of tax exemption); but see *Tarrant County Water Supply Corp. v. Hurst-Euleless-Bedford Indep. Sch. Dist.*, 391 S.W.2d 162, 163 (Tex. Civ. App.--Fort Worth 1965, writ ref'd n.r.e.) (holding that water supply corporation with power of eminent domain was not political subdivision).

¹⁵See *Lower Colorado River Auth.*, 190 S.W.2d at 50-52; *Lewis Cox & Son, Inc.*, 538 S.W.2d at 662-63; *Bexar-Medina-Atascosa Counties Water Improvement Dist. No. 1*, 21 S.W.2d at 748-49.

¹⁶V.T.C.S. art. 717s, § 4.041(c).

¹⁷*Jones v. Williams*, 45 S.W.2d 130, 131 (Tex. 1931); Attorney General Opinion DM-383 (1996) at 7 n.6.

Where a governmental body does not hold legal title to property, courts have determined that the property is nevertheless owned by a governmental body if a governmental body holds equitable title to the property.¹⁸ We said in DM-383 that “[c]ourts generally conclude that a governmental body holds equitable title if the governmental body possesses the property to which it does not hold legal title and if the governmental body may take legal title upon its performance of certain specified conditions.”¹⁹ On the other hand, where the governmental body may take legal title only when the holder of legal title performs certain actions, or where the governmental body otherwise cannot compel conveyance of the title to it, a court generally will find that the governmental body holds neither equitable title nor legal title, and the property is not publicly owned.²⁰

In this case, the lease/purchase agreement gives Karnes County the option to purchase the center on or after March 1, 2005, and thereby terminate the lease. The lease may also terminate upon the payment by the county of all the lease payments. In the event of both of these occurrences, the county gains legal title to the center. On the other hand, the county may terminate the lease by failing to appropriate funds from the center’s revenues to pay the lease payments, or the lessor may elect to terminate the lease if the county defaults. In both of these latter instances, the county would not gain legal title to the center. Like the agreement at issue in DM-383, the lease/purchase agreement and the underlying facts in this case appear similar to the facts in *Texas Department of Corrections v. Anderson County Appraisal District*, where the court concluded that the state held equitable title to a prison unit where the state would acquire full legal title to the prison when all payments under a lease/purchase agreement were made.²¹ Yet the facts in this case, like those in DM-383, differ from the facts in *Texas Department of Corrections*.²² Because we cannot predict how a court would view these differences, we cannot say as a matter of law whether the center is publicly owned.

¹⁸See *Texas Turnpike Co.*, 271 S.W.2d at 401-02; *Texas Dep’t of Corrections v. Anderson County Appraisal Dist.*, 834 S.W.2d 130, 131 (Tex. App.--Tyler 1992, writ denied). “In Texas, . . . an equitable title is a right, enforceable in equity, to have the legal title to real estate . . . transferred to the owner of the right.” Attorney General Opinion DM-383 (1996) at 3 (quoting *United States v. Davidson*, 139 F.2d 908, 910 (5th Cir. 1943)) (footnote omitted).

¹⁹Attorney General Opinion DM-383 (1996) at 4; see *Texas Dep’t of Corrections*, 834 S.W.2d at 131.

²⁰See *Texas Turnpike Co.*, 271 S.W.2d at 401-02; *Tarrant County Water Supply Corp.*, 391 S.W.2d 162.

²¹See *Texas Dep’t of Corrections*, 834 S.W.2d at 131; see also Attorney General Opinion DM-383 (1996) at 5-6 (discussing *Texas Department of Corrections*).

²²For example, in *Texas Department of Corrections*, the state owned the land upon which the prison was built. See 834 S.W.2d at 130-31. In this case, legal title to the land underlying the center, like the center itself, is held by the PFC. Also, while the county may compel conveyance of legal title to the prison upon the county’s exercise of its option to purchase or its payment of all rents due under the lease, the lease may be terminated, and no legal title conveyed, if the county defaults on the lease or if it fails to appropriate money to pay the rent. In *Texas Department of Corrections*, the court stated: “It is undisputed that the state, which is in possession of the property, will acquire full legal title to the [prison] when all the payments are made.” *Id.* at 131.

The appraisal district argues that even if the center is publicly owned, it is taxable as a matter of law because it is operated by a private company. A county commissioners court is authorized by the legislature to “contract with a private vendor to provide for the financing, design, construction, leasing, operation, purchase, maintenance, or management of a jail, detention center, work camp, or related facility,” provided the court complies with certain notice, approval, and contract requirements,²³ and we assume that the county contracted with BRG pursuant to this authority. We do not agree that private operation of a public jail precludes tax exemption as a matter of law. The public property inquiry for purposes of the constitutional and statutory tax exemptions is concerned with ownership of the facility, not its operation. A publicly owned facility may be tax exempt even if it is privately operated, provided the center is used for public purposes.

In sum, we cannot determine as a matter of law whether the Karnes County Correctional Center is publicly owned. We conclude, however, that the center is not publicly owned merely because legal title to the center is held by a public facilities corporation. We also conclude that a finding of public ownership is not precluded merely because the center is privately operated.

We next consider whether the property is used for public purposes. Your letter suggests that the center is used for public purposes because it is owned and used by a PFC. The Public Facilities Corporation Act states that a PFC may be formed only for the purpose of constructing or financing a public facility, defined by the act as “any real, personal, or mixed property, or any interest in property devoted or to be devoted to public use, and authorized to be financed, refinanced, or provided by sponsor obligations.”²⁴ But we decline to hold as a matter of law that any facility owned by a PFC is used for public purposes merely because the statute says it is so. Whether a particular facility is used for public purposes is a question of fact to be determined on a case-by-case basis.²⁵

Public property is used for public purposes if it is used primarily for the health, comfort, and welfare of the public.²⁶ “It is not essential that it be used for governmental purposes It is sufficient if it be property which all of the public has a right to use under proper regulations”²⁷ Furthermore, “[t]he fact that charges are made or compensation is received for its use does not withdraw it from its public character, provided such charges are an incident to its use by the public and the proceeds received for its use inure to the benefit of the political subdivision.”²⁸ You point

²³Local Gov’t Code §§ 351.102, .103.

²⁴V.T.C.S. art. 717s, § 1.003(10).

²⁵See *Texas Turnpike Co.*, 271 S.W.2d at 402 (“Public ownership, for tax-exemption purposes, must grow out of the facts; it is a legal status, based on facts, that may not be created or conferred by mere legislative . . . declaration.”).

²⁶*A&M Consolidated Indep. Sch. Dist. v. Bryan*, 184 S.W.2d 914, 915 (Tex. 1945).

²⁷*Id.* at 915-16.

²⁸*Id.*

out that the courts and this office have presumed, without deciding, that a prison is property used for public purposes.²⁹ No case or opinion has considered whether the same presumption can be made if the prison houses only prisoners from another state. The appraisal district argues that a prison used to house out-of-state inmates is not used for the public purposes of the State of Texas and thus is not exempt from taxation.

In *A&M Consolidated Independent School District*,³⁰ the Texas Supreme Court considered whether city utility lines extending beyond city limits to serve inhabitants outside the city were used for a public purpose. The court held that the right to the exemption does not depend upon where the property is located or the residence of those who enjoy the use thereof. "It is the fact that the property is owned by the public and is used for the welfare of the public of some portion of the State that entitles it to the exemption."³¹ Thus property need not be devoted exclusively to the inhabitants of the political subdivision owning the property in order for the property to serve a public purpose. Yet the property must be used for the benefit of the public of some part of *this* state.

While a county is obligated to provide "safe and suitable jails for the county,"³² it is under no obligation to house prisoners from other states. Changes to chapter 511 of the Government Code adopted by the Seventy-fifth Legislature authorize counties to contract with another state for the housing of the other state's prisoners.³³ However, in our view, when a county constructs or operates a prison solely or primarily for the purpose of contracting with another state to house that state's prisoners, it does not do so for the public purposes of this state. The fact that the county benefits financially from the arrangement is not sufficient to establish a public purpose.³⁴

²⁹See Attorney General Opinion DM-383 (1996) at 3; *Texas Dep't of Corrections*, 834 S.W.2d at 131; *Lower Colorado River Auth.*, 190 S.W.2d at 53 (Alexander, C.J., Sharp, J., and Simpson, J., dissenting) (stating that examples of tax-exempt property in article XI, section 9 "comprehend such properties as . . . jails").

³⁰184 S.W.2d 914 (Tex. 1945).

³¹*Id.* at 916.

³²Local Gov't Code § 351.001.

³³Gov't Code § 511.0092.

³⁴See *Grand Prairie Hosp. Auth. v. Dallas County Appraisal Dist.*, 730 S.W.2d 849, 851 (Tex. App.--Dallas 1987, writ ref'd n.r.e.) (holding that lease of space in public building to physicians for private use is not property used for public purposes).

We note that article III, section 52-a of the Texas Constitution permits the legislature to "provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state, [and] the elimination of unemployment or underemployment in the state." We stated in Attorney General Opinion JM-1255 (1990) at 8 that "Section 52-a expands the definition of public purposes to include economic development" and creates exceptions to the pre-existing constitutional prohibition against the lending of credit. We know of no authority in support of the proposition that section 52-a creates public purpose

(continued...)

While you tell us that the center houses Colorado prisoners, we do not know whether the center is solely or primarily occupied by out-of-state prisoners, or whether the center was built solely or primarily for this purpose. These are facts that a court would examine to determine whether the center is used for public purposes. Thus we cannot determine as a matter of law in the opinion process whether the center is exempt from ad valorem taxation as public property used for public purposes.

Finally, we turn to the tax provisions of the Public Facility Corporation Act. With respect to taxation of a facility owned by a PFC, the act provides as follows:

Sec. 4.042. (a) A public facility, including a leasehold estate in a public facility, that is owned by a corporation and that, except for the purposes and nonprofit nature of the corporation, would be taxable to the corporation under Title 1, Tax Code, shall be assessed to the user of the public facility to the same extent and subject to the same exemptions from taxation as if the user owned the public facility. If there is more than one user of the public facility, the public facility shall be assessed to the users in proportion to the value of the rights of each user to occupy, operate, manage, or employ the public facility.

(b) The user of a public facility is considered the owner of the facility for purposes of the application of:

(1) sales and use taxes in construction, sale, lease, or rental of the public facility; and

(2) other taxes levied or imposed by the state or a political subdivision of the state.

V.T.C.S. art. 717s, § 4.042(a), (b). Under subsections (a) and (b), where a public facility corporation owns a public facility, taxes on the facility are assessed not to the PFC but to the “user” of the facility. The user of the facility is subject to the same taxes, and exemptions therefrom, as if the user owned the facility.

The act does not define the term “user.” As the term is ordinarily understood, the “user” of the center could be said to be one or more of several entities, including the county, which leases the center from the PFC; BRG Operations of South Texas, Inc., which operates and manages the center; or the State of Colorado, whose prisoners are housed there. Where there is more than one user, taxes are assessed according to the users “in proportion to the value of the rights of each user to occupy,

³⁴(...continued)

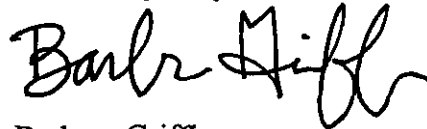
exceptions for purposes of the constitutional and statutory tax exemptions at issue in this opinion, or that a public facility authorized by V.T.C.S. article 717s is a program that serves these purposes.

operate, manage, or employ" the facility. *Id.* § 4.042(a). If it is determined that the county, a public entity, is the owner, and that the center is used for public purposes, the county would be exempt from paying ad valorem taxes on the center or on that portion of the center that it has the right to use. The resolution of this issue requires fact finding that we are unable to make in the opinion process.

S U M M A R Y

The Karnes County Correctional Center is exempt from ad valorem taxation pursuant to article XI, section 9 of the Texas Constitution and section 11.11(a) of the Tax Code if the center is publicly owned property used for public purposes. Whether the center is public property used for a public purpose requires determinations of fact that are not appropriately made in an attorney general opinion. We conclude, however, that the center is not publicly owned merely because title to the center is held by a public facility corporation created pursuant to the Public Facility Corporation Act, V.T.C.S. article 717s. We further conclude that when a county constructs or operates a prison solely or primarily for the purpose of contracting with another state to house that state's prisoners, it does not do so for the public purposes of this state.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Barbara Griffin', with a stylized, cursive script.

Barbara Griffin
Assistant Attorney General
Opinion Committee